SEPARATE OPINION OF JUDGE VERESHCHETIN

While I am in agreement with the Judgment delivered by the Court, I feel obliged to deal in this opinion with one important issue which, in my view, although not addressed in the reasoning of the Judgment, also bars the Court from adjudicating upon the submissions in the Application of the Portuguese Republic.

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Besides Indonesia, in the absence of whose consent the Court is prevented from exercising its jurisdiction over the Application, there is another "third party" in this case, whose consent was sought neither by Portugal before filing the Application with the Court, nor by Australia before concluding the Timor Gap Treaty. Nevertheless, the Applicant State has acted in this Court in the name of this "third party" and the Treaty has allegedly jeopardized its natural resources. The "third party" at issue is the people of East Timor.

Since the Judgment is silent on this matter, one might wrongly conclude that the people, whose right to self-determination lies at the core of the whole case, have no role to play in the proceedings. This is not to suggest that the Court could have placed the States Parties to the case and the people of East Timor on the same level procedurally. Clearly, only States may be parties in cases before the Court (Article 34 of the Statute of the Court). This is merely to say that the right of a people to self-determination, by definition, requires that the wishes of the people concerned at least be ascertained and taken into account by the Court.

To do so in this case the Court should have had reliable evidence on how far the Application was supported by the people of East Timor. It was especially important in the circumstances of the case, where the rights consequential to the status of Portugal as administering Power, including the right to litigate before the Court for the people of East Timor, were strongly contested by the Respondent State. I have no desire whatever to cast any doubt on Portugal's good intentions in bringing the case before the Court. However, without clear evidence to the contrary, the Court cannot easily dismiss the contention that, 20 years after the loss of effective control of the Territory, Portugal is not in a position to act in the Court with full knowledge of the wishes and views of the majority of the East Timorese people.

Even under normal circumstances, the denomination of an applicant State as administering Power does not diminish the necessity for the Court to check its claims by reference to the existing evidence of the will

of the people concerned. As was observed by Portugal in the oral pleadings, the right of a people to self-determination presumes that:

> "In the concrete situation it must be looked at to see whether the interests of an administering Power (if as is usual, it is still in effective control), or any other power, really coincide with those of the people." (CR 95/13, p. 36, para. 88, Professor Higgins.)

This would seem to suggest that the same requirements apply *a fortiori* to an administering Power which for many years has not been in effective control of the territory concerned. Portugal also asserted that it represents the Territory of East Timor in the domain of relations between States "in close contact with the representatives of the people of East Timor" (CR 95/12, p. 63, para. 21, Professor Correia). It reproached Australia (in principle quite rightly) for not having previously "secured the approval of the peoples of the Territory through their leaders" of the Treaty at issue (CR 95/13, p. 38, para. 94, Professor Higgins).

After all these statements, one might have expected Portugal's Application to be substantiated by credible evidence that Portugal had itself secured the support of its Application by the East Timorese people. However, neither in the written pleadings and annexed documents, nor in the course of the oral arguments and replies, has the Court been provided with such evidence, except for cursory press references which did not even mention the object of the dispute — the Timor Gap Treaty (e.g., CR 95/12, pp. 69-70, Professor Correia).

The necessity for the Court to have this evidence was only reinforced by the fact that the other Party in the dispute sought to disclaim the alleged disregard and infringement of the legal rights and interests of the people of East Timor. It argued, *inter alia*, that:

> "if Australia had done nothing, and refused to negotiate this agreement [the Timor Gap Treaty] with Indonesia, there would have been no chance of any exploitation of any of the disputed areas: the economic benefits to the people would have been nil" (CR 95/11, p. 42, Professor Bowett).

Moreover, "In Australia's view, the real situation is that East Timor will be deriving economic benefits from resources on the Australian shelf." (*Ibid.*, p. 44.) In its Rejoinder, Australia also argues that: "The Treaty is potentially far more beneficial to the people of East Timor *provided Indonesia passes on an equitable part of the benefits to the people*" (para. 160); and that the: "Judicial recourse by Portugal *against Australia* is not, therefore, 'le moyen le plus effectif' by which the rights of the people of East Timor to their natural resources can be protected" (*ibid.*).

The argument of Australia on this crucial matter for the case has also not been supported by any evidence of the previous consultation of the

people of East Timor, and therefore did not sound convincing. However, since the Court, for the reasons stated in the body of the Judgment, stopped short of deciding the dispute on the merits, it could not be expected to pronounce on Australia's duty (or lack of it) to consult the East Timorese people.

The matter is quite different when it comes to Portugal's duty to consult the leaders or representatives of the people before submitting the case to the Court on its behalf. In the latter instance, the question was connected with the admissibility of the Application and remained within the framework of the preliminary jurisdictional finding of the Court. The Court should have reacted to the repeated statements by Portugal that its rights and interests in this case were only "functional" and that "the main interest in bringing the present proceedings belongs to the people of East Timor" (CR 95/6, p. 56, para. 15, Professor Correia).

True, in the *Western Sahara* Advisory Opinion the Court noted that:

> "The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory." (*I.C.J. Reports 1975*, p. 33, para. 59.)

The Court went on to say that:

> "Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances." *(Ibid.)*

In the instance of East Timor, however, the General Assembly has found it appropriate not "to dispense" with the requirement of consulting the inhabitants of East Timor in "exploring avenues for achieving a comprehensive settlement of the problem" (resolution 37/30 of 23 November 1982). The Assembly required the Secretary-General "to initiate consultations *with all parties* directly concerned" (*ibid.*; emphasis added).

In accordance with this resolution, the Secretary-General has been holding consultations, not only with the Governments of Indonesia and Portugal, but "with a broad cross-section of East Timorese representing various trends of opinion" as well (doc. SG/SM/5519 of 9 January 1995). Thus, in the consultations under way in the United Nations on the future of East Timor, the East Timorese people is considered as a distinct party "directly concerned", which can speak for itself through its representatives.

In contrast to the instances mentioned in the above dictum of the Court in the *Western Sahara* case, where the consultation of the inhabitants of a given territory "was totally unnecessary, in view of special circumstances", in the case before the Court the "special circumstances" described above dictate the necessity for the Court at least to ascertain

the views of the East Timorese representatives of various trends of opinion on the subject-matter of the Portuguese Application.

In the absence of direct evidence of these views, which admittedly may be difficult to obtain given the present situation in East Timor, the Court could have been provided with the opinion of the appropriate organs of the United Nations, which exercise overall supervision of the non-self-governing territories. However, the Court has not had its attention drawn to any pronouncements of the Security Council, the General Assembly, the Committee of Twenty-Four or any other organs of the United Nations which could serve as an expression of the international community's concern regarding the concrete matter under consideration in the Court. In the course of the pleadings no reference was made to any resolutions of these organs challenging the Timor Gap Treaty, or reflecting the overt discontent of the people of East Timor with that Treaty (as is the case, for instance, with the human rights situation in East Timor). This, moreover, despite the fact that the Treaty had been under negotiation for ten years, and that Portugal had informed the Secretary-General and, through him, all the Members of the United Nations of its protest on the occasion of its conclusion in 1989.

The United Nations Charter, having been adopted at the very outset of the process of decolonization, could not explicitly impose on the administering Power the obligation to consult the people of a non-self-governing territory when the matter at issue directly concerned that people. This does not mean, however, that such a duty has no place at all in international law at the present stage of its development and in the contemporary setting of the decolonization process, after the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)).

In the *Western Sahara* Advisory Opinion the Court states that: "in certain cases the General Assembly has dispensed with *the requirement* of consulting the inhabitants of a given territory" (*I.C.J. Reports 1975*, p. 33, para. 59; emphasis added). By implication, it means that, as a rule, the requirement to consult does exist and only "in certain cases" may it be dispensed with. The exceptions to this rule are stated in the same dictum of the Court and, as has been shown above, they could not be held to apply in the present case. I believe that nowadays the mere denomination of a State as administering Power may not be interpreted as automatically conferring upon that State general power to take action on behalf of the people concerned, irrespective of any concrete circumstances.

In light of the above considerations, I conclude that the absence of Indonesia's consent is but one of the reasons leading to the inability of the Court to decide the dispute. The other, in my opinion, no less important, reason is the lack of any evidence as to the views of the people of East Timor, on whose behalf the Application has been filed.

(Signed) Vladlen S. VERESHCHETIN.